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UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

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|---------------------------|---|--------------------------|
| United States of America, |) | |
| Plaintiff, |) | |
| |) | |
| |) | |
| vs. |) | Case No. 20-cr-40036-TSH |
| |) | |
| |) | |
| Vincent Kiejzo, |) | |
| Defendant. |) | |

BEFORE: The Honorable Timothy S. Hillman

Motion Hearing

United States District Court
Courtroom No. 2
595 Main Street
Worcester, Massachusetts
March 17, 2022

Marianne Kusa-Ryll, RDR, CRR
Official Court Reporter
United States District Court
595 Main Street, Room 514A
Worcester, MA 01608-2093
508-929-3399 justicehill@aol.com
Mechanical Steno - Transcript by Computer

1 APPEARANCES:

2 United States Attorney's Office
3 Kristen Noto, Assistant United States Attorney
4 Donohue Federal Building & Courthouse
5 595 Main Street, Suite 206
6 Worcester, Massachusetts 01608
7 on behalf of the Government

8 Federal Public Defender Office
9 Sandra Gant, Assistant Federal Public Defender
10 Caitlin Jones, Assistant Federal Public Defender
11 District of Massachusetts
12 51 Sleeper Street, 5th Floor
13 Boston, Massachusetts 02210
14 on behalf of the Defendant
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P R O C E E D I N G S

(The following proceedings were held in open court before the Honorable Timothy S. Hillman, United States District Judge, United States District Court, District of Massachusetts, at the Donohue Federal Building & United States Courthouse, 595 Main Street, Worcester, Massachusetts, on March 17, 2022.)

THE CLERK: All rise.

Court is now open. You may be seated.

Case No. 20-40036, United States versus Vincent Kiejzo.

Counsel, please note your appearance for the record.

MS. NOTO: Good afternoon, your Honor. Kristen Noto for the United States.

THE COURT: Good afternoon, Ms. Noto.

MS. GANT: Good afternoon, your Honor. Sandy -- Sandra Gant on behalf of Mr. Kiejzo. Along with me is Caitlin Jones from my office as well.

MS. JONES: Good afternoon, your Honor.

THE COURT: Good afternoon, both of you.

And good afternoon, Mr. Kiejzo.

THE DEFENDANT: Good afternoon.

THE COURT: So this is your party. Why don't you start.

MS. GANT: It is. Thank you, your Honor.

MS. NOTO: Your Honor, if I may, we requested an in

1 hearing -- an in-person hearing on this matter, because we
2 learned that the magistrate held a discovery motion that it was
3 very difficult to argue the motion without referencing matters
4 that are under seal and that sidebars on Zoom became
5 complicated as a question of an open or closed court, so we
6 have practiced referring to these matters without identifying
7 the matters under seal, but to the extent that we need to
8 address those, since the court is open, we may ask to approach
9 sidebar.

10 THE COURT: The other thing -- well, sure.

11 MS. NOTO: I don't think it will be necessary really
12 for us to do that.

13 THE COURT: Okay.

14 MS. NOTO: Thank you.

15 THE COURT: All right. Thanks.

16 MS. GANT: Would it be okay if I stepped to the
17 podium?

18 THE COURT: I would prefer it actually.

19 MS. GANT: My glasses tend to -- tend to fog so...

20 On behalf of Mr. Kiejzo, we're asking the Court to
21 find that Judge Hennessy's denial of his motion to compel
22 discovery was predicated on a number of incorrectly
23 misconstrued facts and assumptions and was contrary to law.

24 Before getting into those two big points, I'd like to
25 give the Court at least a kind of global big picture, maybe

1 bird's-eye view of the case and the reasons for the discovery
2 requests themselves.

3 The government sought a search warrant for
4 Mr. Kiejzo's home and devices based on a search warrant
5 affidavit that relies in terms of probable cause entirely on a
6 foreign law enforcement tip regarding a single site visit by an
7 IP address to two Tor hidden service websites on a single day
8 in May 2019.

9 And that foreign law enforcement tip, the government
10 alleges, originated from a foreign law enforcement country with
11 a history of providing information to U.S. law enforcement, and
12 that that country was a rule -- was a country with a rule of
13 law. And the search warrant affidavit asserted that that
14 foreign law enforcement agency obtained the tip from its own
15 investigation, and the government ultimately declined to
16 produce information about how that foreign law enforcement
17 agency deanonymized the IP address in this case and what
18 methodology it used.

19 What we now know is that in June 2019, a totally
20 different foreign law enforcement agency, different from what
21 I'll call the tip giving foreign law enforcement agency, seized
22 the computer server hosting these websites, and the --

23 THE COURT: The tip -- the tip giver was disclosed to
24 you?

25 MS. GANT: The tip giver was disclosed.

1 THE COURT: Uh-huh.

2 MS. GANT: But what was not disclosed was the basis of
3 the tip, the reliability of the tip, the methodology of the
4 tip, the information underpinning the tip, and where the tip
5 came from.

6 Also what was not disclosed was the seizing FLA,
7 the -- the -- the foreign law enforcement agency that seized
8 the server. And although the affiant made several assurances
9 about the tip giving FLA being a country with the rule of law
10 and a history of providing solid information, they made no such
11 assurances with respect to the seizing FLA, or whatever other
12 FLA might have been involved, because we just don't know, and
13 it hasn't been disclosed. And the assurances that the tip
14 giving FLA did not interfere with the computer in the United
15 States to secure the information and deanonymize the IP address
16 is limited to the tip giving FLA, not to the -- to the seizing
17 FLA.

18 And it's -- it's our principal position that
19 Mr. Kiejzo should be informed about the manner in which the
20 information was seized, not just how it was disseminated to or
21 collected by what appears to be a secondary FLA.

22 Whether it was a network investigative technique,
23 whether it was malware or whether it otherwise interfered with
24 the U.S. computer is relevant to determine if there was
25 actually a search in this case that predated the search

1 warrant. And it goes directly to the heart of *Valdivia*, which
2 is the First Circuit case that discusses joint investigation
3 issues and whether it involved activity that would have shocked
4 the conscience.

5 And, ultimately, at the heart of our discovery
6 requests, I think, are four things: The relationship between
7 the tip giving FLA, the server seizing FLA and the United
8 States; the methodology used to deanonymize the IP address in
9 this case; the credibility or reliability of the tip; and the
10 completeness of the tip documents provided by the tip giving
11 FLA and the attempts at corroboration by U.S. law enforcement.

12 And all of the discovery requests seek to obtain
13 information about whether or not the search warrant was based
14 on reliable information provided by the tip giving FLA. Again,
15 ultimately relayed and obtained from an as yet unnamed and
16 unknown second foreign law enforcement agency. And it's also
17 necessary, we would suggest, to aid in the defense experts both
18 in a motion to suppress and a trial.

19 And where the government's assurances about the
20 lawfulness and the credibility of the tip are frequently
21 impossible to test without the discovery that we've requested,
22 we think it should be ordered for that reason as well.

23 But I want to first get to the issue of how Judge
24 Hennessy's ruling was contrary to law. Judge Hennessy's
25 standard --

1 THE COURT: So are you -- are you not alleging that it
2 was clearly erroneous?

3 MS. GANT: I am. If I could just address maybe the
4 legal standard first, and then I'll get into the -- the clearly
5 erroneous issues on the facts.

6 THE COURT: So are you saying that -- I'm just trying
7 to get a sense of the -- the scope. So you're saying it is
8 clearly erroneous and contrary to law?

9 MS. GANT: That's right, your Honor.

10 THE COURT: Okay.

11 MS. GANT: And I'll begin with the latter. So Judge
12 Hennessy's standard, which is plainly set forth at the hearing
13 on Mr. Kiejzo's motion to compel and in his order was that the
14 government had already provided sufficient evidence to enable
15 the defendant to file and litigate a motion to suppress. So he
16 was not entitled to any more discovery. But that's
17 inconsistent with the materiality standard that's articulated
18 in *United States versus Goris*, which requires some indication
19 that pretrial disclosure of the information sought would have
20 enabled the defendant significantly to alter the quantum of
21 proof in his favor.

22 What Judge Hennessy did was it took that some
23 indication language and -- and turned it effectively into a
24 significant indication, which is not the standard, and it's not
25 supported by the First Circuit. It's also inconsistent, Judge

1 Hennessey's standard, with the discovery obligations and the
2 standards that are set forth in local Rule 116.2.

3 Ultimately, Mr. Kiejzo maintains that the requested
4 discovery is discoverable under both Rule 16 and local
5 Rule 116.2. He requested them. The government has them. The
6 items are material to the preparation of his defense, and we
7 would suggest that they're exculpatory, because they cast out
8 on the accuracy of the information in the search warrant, and
9 it goes directly to the admissibility of evidence that the
10 government anticipates to offer --

11 THE COURT: Counsel, can I ask you to speak a little
12 more slowly --

13 MS. GANT: Absolutely.

14 THE COURT: -- or Marianne's going to --

15 MS. GANT: Absolutely.

16 THE COURT: -- have words with you and me.

17 MS. GANT: I was a high school debater so if you know
18 anything about that, they talk very fast. So I apologize.

19 But ultimately, we would suggest that Mr. Kiejzo did
20 make his initial showing before Judge Hennessey, showing that
21 there are inaccuracies in the affidavit, and if those
22 inaccuracies are corrected and if omitted information is added
23 to the affidavit there would not have been probable cause to
24 search Mr. Kiejzo's home.

25 THE COURT: So what are the inaccuracies?

1 MS. GANT: So there are both inaccuracies and
2 omissions.

3 The search warrant affidavit and the affiant
4 ultimately presents the tip as a single solitary well-supported
5 tip from a single foreign law enforcement agency. There's no
6 reference to it having originated from a second as yet unnamed
7 foreign law enforcement agency. All the assurances about it
8 being a country of a rule of law and that no computer was
9 interfered with in the United States only applies to the tip
10 giver, not to the seizing FLA; and without information about
11 the methodology, without information about how that tip giving
12 FLA came to that information, there's zero information about
13 how reliable or credible the tip could have been.

14 THE COURT: So the -- the affidavit recites
15 that -- the FLA advised the U.S. law enforcement that he
16 obtained the information through an independent investigation
17 that was lawfully authorized in FLA's country pursuant to its
18 national laws and that the FLA had not interfered with,
19 accessed, searched or seized any data from any computer in the
20 U.S.?

21 MS. GANT: That's right, your Honor. That is the
22 representation that's in the affidavit; however --

23 THE COURT: And that's erroneous how?

24 MS. GANT: Well, what's erroneous and what is -- what
25 is omitted is that the origin of the information -- ultimately

1 what we find out through the discovery documents, and that's in
2 the exhibits, is that the tip giving FLA relied it -- relied on
3 the issuance of bulk warrants to access this data without
4 information as to what the origin of the data was. For all we
5 know, the tip giving FLA issued a warrant to the seizing FLA
6 for the information that it had obtained in its -- on the
7 server that it had seized, and the tip -- and I'm sorry. The
8 seizing FLA, I think, supported, as I'll talk about in a moment
9 with the facts from *Mitrovich*, could have had U.S. assistance.
10 And it's clear at least at some point that the United States
11 was monitoring one of the particular websites, and I think it's
12 reasonable to conclude that they had a mere image of one of the
13 websites, and the facts as laid out in *Mitrovich*, which I'll
14 get to in a moment, demonstrate the capacity of U.S. law
15 enforcement at the front end with the seizing FLA to engage in
16 that joint investigation and kind of pass off the information,
17 launder it, so to speak, through the tip giving FLA. So that
18 the tip giving FLA can say, we're authorized to issue both
19 warrants. We got it lawfully. This was our investigation,
20 because we issued the bulk warrant, but there's no information
21 as to where the information came from or how it was produced.

22 And to suggest that no computer was interfered with as
23 a blanket statement without discussing and mentioning that
24 there was a first FLA that seized the server and ultimately
25 collected this data that was then disseminated to the tip

1 giving FLA, that is hugely -- that is a huge omission, I think,
2 that goes directly to the heart of probable cause and directly
3 to the *Franks* issue.

4 Now, the government didn't file an opposition to the
5 defendant's objection here, but they did file an opposition to
6 the defendant's motion to compel, which was heard by Judge
7 Hennessy. And both that opposition and Judge Hennessy's
8 decision essentially rests denial of the discovery request on
9 its characterizations of the defendant's grounds as
10 speculative.

11 It's a difficult position to be in because we're
12 essentially limited by the information that they've given us,
13 which is very little, and we did extensive research based on
14 the information that we had to -- to identify areas of
15 potential suppression grounds and *Franks* grounds.

16 In terms of the *Franks* issue, and I won't belabor this
17 point because I think our objection touches on this quite
18 heavily, but none of the cases cited by the government in their
19 opposition or even by Judge Hennessy in his order involve a
20 comparable dearth of discovery that we have here or a
21 comparable missing link in the chain here; and ultimately, the
22 standard that the government asks this Court to uphold and that
23 Judge Hennessy's misinterpretation of *Goris* suggests, is that
24 the government can withhold evidence relative and material to
25 the filing of a *Franks* motion and say, well, you haven't told

1 us what you think we have and how it could help your case or a
2 motion. And that is an unattenable position. It's
3 inconsistent with *Brady*, and it's inconsistent with the local
4 rules.

5 Judge Hennessy's factual findings were also erroneous
6 because ultimately he made several assumptions, which we now
7 know to be untrue about what the U.S. law enforcement did and
8 what they could have done in this case. Judge Hennessy
9 essentially said there's no reason to believe that the United
10 States would have been involved on the front end of this to
11 engage with the seizing FLA, the foreign law enforcement
12 agency, to obtain the information and kind of launder it
13 through a reputable tip giving FLA. But the Northern District
14 of Illinois case of *Mitrovich*, I think, is a perfect example of
15 not only how plausible this is, but of an example where the
16 court ordered discovery in this exact situation.

17 In *Mitrovich*, the FBI began investigating child
18 pornography websites in 2014. That same year, the FBI obtains
19 the ability to identify IP addresses associated with the
20 website. They learned it was hosted in the Netherlands with
21 the head administrator residing in Australia. And the FBI then
22 gave that information to Australia, and law enforcement
23 agencies from Australia and New Zealand, seized control of the
24 website. They operated it undercover, and they shared backup
25 copies of the website with the FBI, essentially doing the FBI's

1 dirty work so the FBI could say, our hands are clean. We
2 didn't -- we weren't the ones that interfered with a computer
3 in the United States. They get the -- they give this
4 information to foreign law enforcement agencies, and they're
5 the ones that do the network investigative technique.

6 In that case, one user clicked on a hyperlink, which
7 revealed his IP address based on this -- this technique that
8 New Zealand and Australia employed, and that user was in the
9 United States. They transmitted that information, the
10 Australian and New Zealand employees transmitted that
11 information to the FBI, and they obtained records from Comcast
12 to identify the physical address associated with the
13 IP address.

14 That's what happened here in terms of the level of
15 corroboration. All that the United States did in response to
16 emailing to get this what I would call laundered tip from the
17 tip giving FLA, was just to verify that the IP address was
18 registered to Mr. Kiejzo's home. There was no other
19 corroborating information that would have suggested that more
20 than a year prior he had accessed a website or accessed
21 material.

22 And in *Mitrovich*, the Court found that the defendant,
23 we would suggest here, too, had made a prima facie showing that
24 the joint venture doctrine applied, and it held that the motion
25 to compel couldn't be denied, based on the government's

1 submission that the exclusionary rule didn't apply to the
2 investigatory conduct of Australia and New Zealand.

3 And I would also point the Court, which is cited in
4 our motion to the Ninth Circuit case of *United States versus*
5 *Budziak*, with a B, holding that it was an abuse of discretion
6 for the District Court to deny discovery relative to a software
7 program that was developed by the FBI to see what files
8 particular users were downloading, essentially saying that
9 criminal defendants should not have to rely on the government's
10 word that further discovery is unnecessary.

11 But Judge Hennessy's rulings were also erroneous as
12 evidenced by the defendant's supplemental memorandum and the
13 exhibits that were part of the defendant's supplemental
14 memorandum, because they substantially undermine the
15 government's repeated assertions that our claims are
16 speculative.

17 I would point the Court first to -- and I apologize.
18 Ms. Noto informed me that I double named the exhibits A through
19 et cetera on the -- on the objection, and A through et cetera
20 on the -- on the supplemental memorandum. So I apologize if
21 that resulted in confusion. But Exhibit G, as in George, to
22 our supplemental materials is the case of the *United States*
23 *versus Stauffer*. And that case appears to have arisen out of
24 the exact same law enforcement investigation, the exact same
25 FLA tip, and the exact same website that is alleged to

1 be -- have been visited by the IP address registered to
2 Mr. Kiejzo's family.

3 In the criminal complaint in *Stauffer*, the government
4 says that ultimately agents talk to -- to the defendant in
5 January 2020, and he admits that he was on this website, and he
6 gave them his username and his password; and a few days later,
7 the FBI provided information that that online activity of that
8 specific username accessed that specific website during a
9 particular time frame that is the same here essentially. And
10 the FBI provided a number of messages that had been posted by
11 somebody with the same username during that time frame. And
12 the ultimate takeaways here from *United States versus Stauffer*
13 is that the FBI had a searchable copy of that website from
14 between 2016 and 2018. It suggests that the United States'
15 role and investigation is much more significant than the
16 government has ever disclosed here. It suggests that the FBI
17 had much more information about Mr. Kiejzo.

18 THE COURT: So are you -- I mean, is it your position
19 that the affiant was being deliberately misleading?

20 MS. GANT: I don't know the Court needs to find that
21 in order to grant the discovery, but I'm troubled by the
22 precision --

23 THE COURT: It's not -- I'm not saying that.

24 MS. GANT: But I'm troubled, I should say, by the
25 precision of the language that was used here, because what we

1 have here is this description of a tip -- of an FLA, without
2 describing a second FLA. And although it says that the un-FLA
3 seized the server, there's no distinguishing between the two.
4 And that lack of precision, or maybe even the deliberate
5 precision to mislead the Court to believe that the tip was
6 single, solitary, reliable, credible coming from a country with
7 a rule of law, with no back history whatsoever, I would suggest
8 that is misleading. Whether or not it was deliberate, I mean,
9 I don't think I can necessarily say, but the structure of
10 the -- of the affidavit -- of the affidavit is very troubling,
11 especially when the Court looks to all of the exhibits in the
12 supplemental memorandum, which show that the tip giving FLA
13 essentially gave the FBI tons of IP addresses; and that, I
14 think, goes to the issue of reliability, because if the tip
15 giving FLA gave the FBI tons of IP addresses and said IP
16 address in Texas, IP address in Northern District of Illinois,
17 in Massachusetts, in Tennessee, they all accessed a website on
18 a particular date and time, as opposed to one person accessed a
19 website on a particular date and time, and we have that
20 information based on credible information. The difference
21 there, I think, suggests the deployment of a network
22 investigative technique, some development of technology or
23 methodology to be able to unmask that information and
24 deanonymize all of those IP addresses. And I think that
25 the -- the fact that the affidavit fails to disclose all of

1 that and fails to give the true history of the case when we
2 have evidence that it is much more expansive and that the
3 United States was much more involved both at the front end and
4 that it had access to the particular website, as evidenced in
5 *Stauffer*; and that in *U.S. v. Clark*, which is Exhibit D, as in
6 dog, to our supplemental memorandum, it's evident that HSI
7 Agent Squire, who's based in Boston, who's a colleague of Agent
8 Moynihan, who drafted the affidavit in this case, and who
9 authored an identical search warrant affidavit in another case
10 out of the District of Massachusetts, it's clear that he viewed
11 the exact same type of website while it was operational. So
12 there was some investigative work that was conducted not just
13 by the FBI, but by HSI and HSI in Boston, which is who is
14 prosecuting Mr. Kiejzo.

15 So I can go into the kind of individual discovery
16 requests, but I do want to point out that --

17 THE COURT: No, I want you to wrap up, if you could,
18 please.

19 MS. GANT: I do -- I'll just leave with one thing.

20 THE COURT: Uh-huh.

21 MS. GANT: At the motion to compel hearing, there was
22 some back and forth between the parties and Judge Hennessy as
23 to whether or not the government could have produced some
24 information or a slightly less redacted version of some of the
25 documents. In the affidavit, for example, it indicates that

1 the tip giving FLA provided a number of tip documents that both
2 reference the website name and reference the IP address. But
3 the documents that were provided by the government are not
4 consistent with that representation in the affidavit. There
5 are certainly missing pieces that I think could be remedied by
6 an unredacting of the tip documents that we have, and I would
7 ask the Court to do that.

8 There's also some additional information in the
9 affidavit that suggests that there were other tip documents,
10 for example --

11 THE COURT: Do you know what was the reason for the
12 redactions? It may be better asked of Attorney Noto, but do
13 you know?

14 MS. GANT: At least as in the discovery responses from
15 the government, it was that they didn't believe that it was
16 relevant to any motion to suppress or defense and that it was
17 relative to an ongoing investigation.

18 So I think I'll leave it there unless the Court wants
19 me to address anything else.

20 THE COURT: I may give you the last word. We'll see.

21 MS. GANT: Okey dokey. Thank you.

22 THE COURT: Attorney Noto, please.

23 MS. NOTO: Thank you, your Honor.

24 If you don't mind, I'm going to stay away from them
25 and take off my mask so you can hear me a little easier --

1 THE COURT: Uh-huh.

2 MS. NOTO: -- but if you prefer that I move to the
3 podium.

4 THE COURT: And it's not me you should be worried
5 about. It's Ms. Kusa-Ryll. She needs to be able to hear and
6 see you.

7 MS. NOTO: I'm sure she'll let me know.

8 Your Honor, the government's position is that Judge
9 Hennessy correctly decided the motion for discovery and that
10 you should maintain that order.

11 The defendant has argued that Judge Hennessy made a
12 number of incorrect factual findings, but I think when you
13 review his order you see he didn't make factual findings.
14 He -- he gave an example of why he thought the defendant's
15 argument was unlikely to carry the day, unlikely to be the only
16 explanation for how things could have turned out.

17 In referring to the *Mitrovich* case, the defendant is
18 giving an example of a completely separate investigation that
19 the FBI participated in and asking the Court to conclude that
20 therefore this must be the only way that the United States or
21 the FLA could have conducted an investigation.

22 I'd also like to clarify the defendant counsel said
23 several times that this information is information that the
24 government has, and I have tried to be very clear we do not
25 know the methodology employed by the FLA. That is not

1 information that is in our records.

2 When Special Agent Moynihan put in her affidavit that
3 that had -- was a tip that came from the FLA and that they
4 represented that the United States had not been involved in
5 identifying or uncovering the IP address, that is the
6 information we have. We don't know how they went about
7 uncovering the IP address.

8 What you've also been given is an affidavit that I
9 believe was marked as Exhibit M to the opposition, and it was
10 a -- this was a declaration of Professor Steven Murdoch
11 essentially asking the Court to adopt his statement, and I
12 would suggest that you should not give this any consideration.
13 It is not an affidavit, first of all, that was filed with
14 respect to this case.

15 As you see from the exhibit itself, it was filed in
16 the case of *United States versus Zachary Sanders*, which is a
17 case out of the Eastern District of Virginia. Not only was
18 that filed in Virginia and not here in Massachusetts, there
19 have been multiple rulings on that case denying that
20 defendant's motions both for discovery and his motion to
21 suppress essentially not adopting Mr. Murdoch's position or
22 opinion that the only way this information could have been
23 obtained is through a NIT and necessarily a NIT that the United
24 States was involved in.

25 But again, I repeat, we do not have information on the

1 methodology that was used by the -- the tip FLA before they
2 provided it to us.

3 The argument, even as you've heard it today, is
4 speculative. The seizing FLA could have been assisted by the
5 United States. That is nothing but speculation. I also don't
6 agree with the defendant's characterization that there was
7 anything hidden in the affidavit.

8 No affidavit will contain every detail of an
9 investigation, but the details in this affidavit are what was
10 necessary for the magistrate to find probable cause in order to
11 issue the search warrant of Mr. Kiejzo's home. It is not
12 necessary, nor is it a material omission, that they didn't
13 identify every organization or every country that had been
14 involved in this investigation leading up to it.

15 THE COURT: Do they know?

16 MS. NOTO: Yes.

17 THE COURT: So the affiant does know the so-called
18 chain or trail?

19 MS. NOTO: I know that the FBI and HSI, the agencies,
20 know the identity of both countries. I don't know if the
21 affiant personally knew the seizing FLA, the name of that
22 country at the time that she wrote out the affidavit. She did
23 know the name of the tip FLA at the time she wrote it out. But
24 yes, the government is aware of the country.

25 THE COURT: Is that -- is that -- and I saw in the

1 papers who that was, is that secure for any reason?

2 MS. NOTO: Yes, these -- information was provided with
3 the understanding that we would not be disclosing their
4 participation in this investigation.

5 THE COURT: And I'm curious as to why that is.

6 MS. NOTO: That is a decision made far above my level,
7 your Honor. I don't know why that decision was made.

8 THE COURT: Huh. Okay. Go ahead. Just go ahead.

9 MS. NOTO: But because there was a representation
10 about their reliability, we did provide that identity pursuant
11 to the protective order, because that is where the tip came
12 from.

13 Again, the defendant said that the -- the seizing FLA
14 would have collected the server and collected all the data.
15 That is another assumption that is made. What we have
16 disclosed is that another country seized the servers, but the
17 data that we have came from the investigation done by the FLA
18 that we have disclosed. And they have represented that they
19 did not interfere with computers in the United States in order
20 to conduct this investigation.

21 There's also -- there's no suggestion in the
22 affidavit, nor has it ever been the position that there were no
23 other United States based IP addresses that were identified
24 through the course of this investigation. What we have
25 declined to do is provide the IP addresses or the other tip

1 particulars that do not pertain to this defendant. But there
2 has never been a position that there aren't any others.

3 And while I -- I cannot tell the Court based on the
4 number of cases that the defendant has assumed our connection
5 to this. I don't know if each and every one of those were
6 identified through this investigation. It is not a secret that
7 there is more than one IP address that may -- that were based
8 in the United States that were identified.

9 What we have declined to do, as I said, is provide the
10 identifying information about any of the other potential users
11 to this defendant.

12 THE COURT: By users?

13 MS. NOTO: I mean IP addresses that accessed those --

14 THE COURT: Okay.

15 MS. NOTO: -- websites.

16 Also to have referred to this as a laundered tip is
17 again pure speculation. The defendant wants to know how his
18 IP address was identified. And I understand that. But that
19 doesn't mean that he is entitled to know the process by which
20 his IP address was identified.

21 This is distinct from the -- the *Budziak* -- I don't
22 know that I pronounced that correctly -- where the FBI was
23 ordered to disclose the code used in their computer system,
24 because in that case the FBI was in possession of and was
25 activating that technology themselves. This is not a similar

1 situation where they were relying on a tip that came from a
2 foreign law enforcement.

3 Your Honor, I don't have a lot more to add, and I
4 don't want to stand here to keep talking just to extend my
5 argument. I -- I know the Court has reviewed the opposition
6 that we filed. I do not find that the defendant has met his
7 burden to show that the findings of Judge Hennessy were either
8 clearly erroneous or contrary to law.

9 Everything that he has identified as exculpatory, I
10 would say, is at best, a speculation on his behalf, that if
11 some things were true, there may be something exculpatory that
12 is in the possession of one of these investigating agencies,
13 but that is not the standard for discovery.

14 And I'd also note that there was a case that was
15 referred to suggesting that there was a lower standard somehow
16 for the disclosure of evidence -- if I could just have one
17 moment. I did want to address that.

18 The defendant was suggesting that in Massachusetts in
19 the *Jordan* matter, the Court was holding that when a defendant
20 seeks discovery to mount a *Franks* challenge, the production of
21 discovery should await an initial showing, not a substantial
22 showing. That's, first of all, a magistrate decision that is
23 unreported. So it's certainly not binding on the Court's
24 decision. But that's also not everything that the Court said.
25 What the Court in *Jordan* said was at a minimum a defendant

1 needs to make a showing that there were inaccuracies in the
2 affiant's essentially repetition of a confidential informant
3 before they would consider giving additional information about
4 additional discovery on the reliability of that individual,
5 that confidential informant, but significantly what the
6 decision says that there's not -- no showing of any
7 inaccuracies in this case so they don't even meet the standard
8 of at minimum an initial showing. There is no lowering of the
9 burden that the defendant must meet in order to obtain
10 additional discovery at this time.

11 THE COURT: Thank you.

12 Is it Ms. Gant?

13 MS. GANT: Ms. Gant, yes.

14 THE COURT: I'll give you the last word as long as
15 you're brief.

16 MS. GANT: I'll be brief. I just have two things to
17 say. The factual record before your Honor, frankly, is far
18 more extensive and developed than has been presented to any
19 court that we're aware of that is dealing with this law
20 enforcement investigation.

21 The government talks about the Murdoch declaration in
22 the *Sanders* case in the Eastern District of Virginia. In that
23 case, the government never disclosed that there was a second
24 seizing FLA. The defendant went to trial, despite the
25 government never having disclosed it, and now there's a motion

1 for a new trial pending on *Brady* grounds. That's what we're
2 seeking to avoid here. But I'm glad that Ms. Keefe -- Ms. Noto
3 raised the confidential informant example, because this brings
4 me back to my roots in State Superior Court.

5 THE COURT: Slowly, please.

6 MS. GANT: Okay. I'm glad that she raised this,
7 because this really is, I think, maybe an unsophisticated
8 example, but it brings me back to my roots in Superior Court.

9 This is essentially like a confidential informant
10 based on multiple-level hearsay. What we have is a tip giving
11 FLA saying here's this information that we think so and so
12 committed a crime. They accessed a website to access child
13 abuse and exploitation material on a particular day. The FBI
14 never asks: How do you know that? How did you get that
15 information? Who told you that? Where did that information
16 come from? Those questions apparently are never asked, and
17 Ms. Noto wants the Court to permit the government to bury its
18 head in the sand and say, we don't know so we shouldn't have to
19 find out.

20 What ultimately is developed in the factual record,
21 and this is the last thing I'll say, is that that tip giving
22 FLA either never discloses to the FBI at the time of the tip,
23 or the FBI knows it, that the information comes from somebody
24 else, somebody else who's not identified to the magistrate or
25 to the parties, somebody else who we don't know who comes from

1 a country with a rule of law, and somebody else who we don't
2 know has a solid basis of information. So that extended link
3 in the chain should be fatal, I think, to the government's
4 claims that his requests are unfounded and unnecessary for the
5 preparation of a defense. But I'll rest on our extensive
6 pleadings.

7 THE COURT: What's the guideline on this one?

8 MS. GANT: I don't actually know, Your Honor.
9 Mr. Kiejzo has no record whatsoever. There was a single thumb
10 drive that was taken from his home not related to the website
11 that was alleged to have been visited in May.

12 THE COURT: Is there any minimum mandatory?

13 MS. GANT: No, there's no minimum mandatory.

14 THE COURT: Okay.

15 MS. GANT: I think with the -- with the child
16 pornography guidelines, I would assume they're high only
17 because of the number of kind of dynamic factors but --

18 THE COURT: How many images are there at issue?

19 MS. GANT: I don't know that I have that information
20 offhand. I may defer to Ms. Noto, but it was a single thumb
21 drive, I think, with some video and some photographs.

22 MS. NOTO: I just don't remember, your Honor --

23 THE COURT: Yeah --

24 MS. NOTO: -- unfortunately.

25 THE COURT: -- it's not germane to what I've got to

1 do.

2 And this case is still with Hennessy, correct?

3 MS. GANT: It is.

4 MS. NOTO: It is.

5 MS. GANT: We have a status conference next week at
6 which point I anticipate that, depending on the Court's ruling
7 here, he'll probably set a briefing schedule.

8 THE COURT: Okay. Thank you. Nice job, you guys.

9 MS. GANT: Thank you, your Honor.

10 (Whereupon, at 4:12 p.m., Court was adjourned.)

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C E R T I F I C A T E

I, Marianne Kusa-Ryll, RDR, CRR, do hereby
certify that the foregoing transcript is a true and accurate
transcription of my stenographic notes before the Honorable
Timothy S. Hillman, to the best of my skill, knowledge, and
ability.

/s/ Marianne Kusa-Ryll3-24-22

Marianne Kusa-Ryll, RDR, CRR

Date

Official Court Reporter